No. 20-1747

IN THE

Supreme Court of the United States

ERICH G. SORENSON,

Petitioner,

v.

COMMONWEALTH OF MASSACHUSETTS,

Respondent.

On Petition for a Writ of Certiorari to the Massachusetts Appeals Court

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the hallway area immediately adjacent to an apartment, in a private multi-family dwelling that is not open to the public, is part of the curtilage of the home for Fourth Amendment purposes.

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. The Cato Institute's Project on Criminal Justice was founded in 1999 and focuses on the proper role of the criminal sanction in a free society, the scope of substantive criminal liability, the proper and effective role of police in their communities, the protection of constitutional and statutory safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement officers.

This case interests Cato because it represents an opportunity to clarify Fourth Amendment doctrine. The Framers of our Constitution recognized that the Fourth Amendment's protections against abuse of government authority is a critical bulwark of Americans' liberty. That protection remains just as essential today. Current curtilage analysis improperly diminishes the Fourth Amendment for millions of Americans who live in multi-family dwellings.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Fourth Amendment guarantees the "right of the people to be secure in their persons, houses,

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[1] Rule 37 statement: All parties were timely notified and consented to the filing of this brief. No part of this brief was authored by any party's counsel, and no person or entity other than *amicus* funded its preparation or submission.

papers, and effects, against unreasonable searches and seizures." Naturally, then, "the home is first among equals" when it comes to the Fourth Amendment. *Collins v. Virginia*, 138 S. Ct. 1663, 1670 (2018) (quoting *Florida v. Jardines*, 569 U.S. 1, 6 (2013). At common law, and under the Fourth Amendment, the protections of the home extend to the surrounding grounds—the curtilage. "The area to which extends the intimate activity associated with the 'sanctity of a man's home and the privacies of life,'" *Oliver v. United States*, 466 U.S. 170, 180 (1984), curtilage is regarded "as part of the home itself." *Jardines*, 569 U.S. at 6; *California v. Ciraolo*, 476 U.S. 207, 212–13 (1986) ("The protection afforded the curtilage is essentially a protection of families and personal privacy in an area intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened.").

Yet for millions of Americans, curtilage protections are often illusory because they live in an apartment building or another type of multi-unit residence. And despite police intrusion into the areas surrounding their homes, courts have repeatedly blessed such actions, finding that residents do not have an "expectation of privacy" because tenants share those spaces with other people. *See, e.g.*, *United States v. Cruz Pagan*, 537 F.2d 554, 558 (1st Cir. 1976); *State v. Edstrom*, 916 N.W.2d 512, 519 (Minn. 2018); *State v. Nguyen*, 841 N.W.2d 676, 678–79 (N.D. 2013). These courts reason that because people beyond the control of the tenant can access those areas, the tenant does not possess a reasonable expectation of privacy and is not protected under the Fourth Amendment.

This narrow view of the Fourth Amendment means that many Americans are insufficiently from government intrusion based on a "right to privacy" analysis that bears scant relation to the original meaning of the Fourth Amendment. The Fourth Amendment does not guarantee some generalized "right to privacy," but rather protects one's "person" and one's "houses, papers, and effects."

The fact that other tenants have access to a common hallway does not make it any less curtilage, any more than the porch of a single-family dwelling does simply because non-residents enjoy some limited access to it as well. This Court recognized as much in *Jardines*, when it found that a Fourth Amendment violation occurred when police used a drug-sniffing dog to investigate the porch outside the home because police exceeded their implied license to approach the front door. 569 U.S. at 9.

There is no sound conceptual basis to distinguish the front porch in *Jardines* from the hallway in apartment buildings. Like the home, apartment buildings are not open to the public. And while a tenant does not fully control who enters the hallways around their apartment, the same is true for a homeowner when a visitor traverses their porch uninvited to knock on their door. In both cases, background social norms show the limited license that visitors (and by extension police) have in these spaces.

Under current curtilage analysis, however, police are not bound by those social norms when they are in an apartment building. This Court's intervention is

necessary to safeguard the Fourth Amendment and to discourage attempts to reduce the Amendment's scope for the millions of Americans who live in apartment buildings.

ARGUMENT

I. THIS CASE OFFERS THE COURT AN OPPORTUNITY TO RETURN TO A PROPERTY-RIGHTS APPROACH TO THE FOURTH AMENDMENT

The original touchstone of the Fourth Amendment was its connection to property. *United States v. Jones*, 565 U.S. 400, 405 (2012). The home especially was afforded special protections against unjustified intrusion by government authorities. "[O]ur law holds the property of every man so sacred, that no man can set his foot upon his neighbour's close without his leave; if he does he is a trespasser, though he does no damage at all; if he will tread upon his neighbour's ground, he must justify it by law." *Entick v. Carrington* (1765) 95 Eng. Rep. 807, 817; *United States v. United States Dist. Court*, 407 U.S. 297, 316 (1972) ("[P]hysical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed"); *see also* 1 Legal Papers of John Adams 137 (L. Kinvin Wroth & Hiller B. Zobel, eds., 1965) (John Adams referring to the castle doctrine as that "strong Protection, that sweet Security, that delightfull Tranquillity which the Laws have thus secured to [an Englishman] in his own House"). Indeed, the "domicile was a sacrosanct interest in late eighteenth-century common law." Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547, 642 (1999).

Unsurprisingly, cases confirm that the touchstone of the Fourth Amendment was trespass upon private property. *See, e.g.*, *Sanford v. Nichols*, 13 Mass. 286, 289 (1816) ("[E]very one is presumed to know that the dwellinghouse of another cannot be lawfully forced, unless for purposes especially provided for by law."); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982) ("The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights."). In *Boyd v. United States*, this Court concluded that the Fourth Amendment blocked the use of a subpoena that required the defendant to divulge certain records. 116 U.S. 616, 638 (1886). The Court insisted that "constitutional provisions for the security of person and property should be liberally construed." *Id.* at 635. The Court also argued that this close link between property interests and the Fourth Amendment meant that "every invasion of private property, be it ever so minute, is a trespass" unless "some positive law has justified or excused" the trespasser. *Id.* at 627 (quoting *Entick*, 95 Eng. Rep. at 817).

And this tradition of tying the Fourth Amendment to property rights continued "at least until the latter half of the 20th century." *Jones*, 565 U.S. at 405; *see also Goldman v. United States*, 316 U.S. 129, 134–36 (1942) (using a "detectaphone" to eavesdrop on conversations through the wall of an office did not violate the Fourth Amendment because there was no trespass to private property); *Olmstead v. United States*, 277 U.S. 438, 464–66 (1928) (holding that because there was no physical trespass, the government's warrantless wiretapping of a suspected

bootlegger's conversations did not constitute a search).

Over the years various technological developments have prompted this Court to depart from the property-rights framework. Thus, in *Katz v. United States*, 389 U.S. 347 (1967), the Court famously created a new Fourth Amendment standard focusing on a "reasonable expectation of privacy." *Id.* at 360 (Harlan, J., concurring). In the following years, *Katz*'s standard came to dominate Fourth Amendment analysis. *See, e.g.*, *Bond v. United States*, 529 U.S. 334 (2000); *California v. Ciraolo*, 476 U.S. 207 (1986); *Smith v. Maryland*, 442 U.S. 735 (1979).

Although this formulation solved some problems, the Founders' property-based conception of the Fourth Amendment was "often lost in *Katz*'s shadow." *Carpenter v. United States*, 138 S. Ct. 2206, 2268 (2018) (Gorsuch, J., dissenting). Moreover, in the absence of a reasonable expectation of privacy, the *Katz* standard has proven insufficient in protecting people from government intrusion.

In recent years, this Court has begun returning to the original understanding of the Fourth Amendment. While *Katz* and a "reasonable expectation of privacy" standard added to the Amendment's protections, it did not replace the property-rights approach to the Fourth Amendment. *Jardines*, 569 U.S. at 5 ("*Katz* may add to the baseline," but "it does not subtract anything from the Amendment's protections when the Government does engage in physical intrusion of a constitutionally protected area"); *Jones*, 565 U.S. at 406 ("[F]or most

of our history the Fourth Amendment was to embody a particular concern for government trespass upon the areas ('persons, houses, papers, and effects') it enumerates. *Katz* did not repudiate that understanding."); *Soldal v. Cook County*, 506 U.S. 56, 64 (1992) (*Katz* test did not "snuf[f] out the previously recognized protection for property."); *Rakas v. Illinois*, 439 U.S. 128, 143 n.12 (1978) ("Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.").

But courts have been reluctant to apply this approach in analyzing curtilage for those living in apartments. As explained below, that reluctance is jurisprudentially unfounded and insufficiently protective of the equal right enjoyed by apartment dwellers to be secure in their persons, houses, and effects from unwarranted government intrusion.

II. SOCIETAL NORMS HAVE LONG INFORMED THIS COURT'S APPROACH TO THE FOURTH AMENDMENT AND SHOW THAT APARTMENT HALLWAYS ARE PROPERLY CONSIDERED CURTILAGE

As discussed above, the phrase "in their persons, houses, papers, and effects" reflects the Fourth Amendment's close connection to property. *Jones*, 565 U.S. at 405. In defining the scope of this property-based interest, courts frequently turn to social norms and expectations. *Jardines*, 569 U.S. at 13 (Kagan, J., concurring) ("[T]he law of property 'naturally enough

influence[s]' our 'shared social expectations' of what places should be free from governmental incursions.") (quoting *Georgia v. Randolph*, 547 U.S. 103, 111 (2006)).

In *Jardines*, the Court held that police officers violated the homeowner's Fourth Amendment rights when they brought a drug-sniffing dog onto the porch of the home. 569 U.S at 11–12. Writing for the majority, Justice Scalia explained that the front porch was considered curtilage but notably he did not rely on *Katz*, nor did he rely on the curtilage factors set forth in *United States v. Dunn*, 480 U.S. 294 (1987). This is likely because there would no reasonable expectation of privacy on a porch that is viewable to the public.

Instead, the majority found that police had trespassed on the curtilage of the home by making analogies to property law. Social norms show that visitors have an "implicit license" to "approach the home by the front path" and "knock promptly." *Jardines*, 569 U.S. at 8. But the implied license permits no more than that, and "absent invitation to linger longer" the visitor must "leave." *Id.* (parentheticals removed). *Jardines* explained that government officials could do "no more than any private citizen might do," absent a warrant or emergency. *Id.*; *see also* William Baude & James Y. Stern, *The Positive Law Model of the Fourth Amendment*, 129 Harv. L. Rev. 1821, 1869 (2016) (arguing the Fourth Amendment requires that "police stand in a position of equality with private citizens"). Because the police transgressed "the background social norms that invite a visitor to the front door" by

bringing a drug-sniffing dog onto the porch, they violated the Fourth Amendment. *Jardines*, 569 U.S. at 9–10.

Relying on well-established social norms to protect Fourth Amendment rights is a longstanding feature of this Court's jurisprudence. Three decades ago, in *O'Connor v. Ortega*, the Court recognized that a government employee has a legitimate privacy expectation in his office, even though "others—such as fellow employees, supervisors, consensual visitors, and the general public–may have frequent access to an individual's office." 480 U.S. 709, 717 (1987) (plurality opinion). Though it was accessible to others, the plurality found that the office was a private place "based upon societal expectations that have deep roots in the history of the [Fourth] Amendment." *Id.* at 716.

The Court again adverted to social norms in *Bond v. United States*, which held that a search occurred when a border patrol agent squeezed the defendant's luggage in a bus's overhead bin. Although "a bus passenger clearly expects that his bag may be handled," he "does not expect that other passengers or bus employees will, as a matter of course, feel the bag in an exploratory manner." 529 U.S. at 338–39; *see also Carpenter*, 138 S. Ct. at 2266 (Gorsuch, J., dissenting) (criticizing the Court's previous decisions in *Florida v. Riley*, 488 U.S. 445 (1989) (helicopter surveillance 400 feet above home) and *California v. Greenwood*, 486 U.S. 35 (1988) (collection and examination of a person's sealed garbage bags) for ignoring clear societal norms in finding there was no reasonable expectation of privacy).

For those living in apartments, the hallway is "intimately linked to the home both physically and psychologically" the same way the porch was in *Jardines*. 569 U.S. at 7. A hallway in an enclosed, multi-unit apartment building "is not a public place." *People v. Killebrew*, 256 N.W.2d 581, 583 (Mich. Ct. App. 1977). Rather, "[i]t is a private space intended for the use of the occupants and their guests, and an area in which the occupants have a reasonable expectation of privacy." *Id.* For many, the locked apartment building offers a respite from the outside world as it excludes all but a small number of people who have a lawful reason to be there—everyone else is a trespasser.

The fact that the landlord, rather than tenants, has the legal right to exclude trespassers from the common areas of an apartment building does not alter the Fourth Amendment analysis. This Court has long held that Fourth Amendment rights, even when approached from a property-rights perspective, are "not synonymous with a technical property interest." *Georgia v. Randolph*, 547 U.S. 103, 110 (2006); *see also Byrd v. United States*, 138 S. Ct. 1518 (2018) (finding that drivers of rental cars have Fourth Amendment rights, even if the drivers are not listed on the rental agreement). Rather, the question is whether law enforcement exceeded the implicit license while they were on the property. *Jardines*, 569 U.S. at 8; *Silverman v. United States*, 365 U.S. 505, 511 (1961) ("[W]e need not pause to consider whether or not there was a technical trespass under the local property law"). Accessing a locked apartment building and arresting a tenant outside the door to his

apartment without a warrant exceeds the scope of the license police possess.

III. COURT INTERVENTION IS NECESSARY TO PREVENT THE DIMINISHMENT OF FOURTH AMENDMENT PROTECTIONS FOR MILLIONS OF PEOPLE

The restricted view of the curtilage doctrine for apartment dwellers impacts the lives of millions of people. For the many Americans living in multi-unit dwellings, protections like the curtilage doctrine are often illusory at best. In this case, the police knocked on Petitioner's door, arrested him, and then proceeded to question him—all without a warrant. All of this would have been plainly unconstitutional if conducted right outside the front door of a single-family home. Moreover, the practice of police barging into apartment buildings uninvited is all the more problematic as it is becoming increasingly prevalent across the country. *See, e.g.*, *United States v. Carloss*, 818 F.3d 988, 1003 (10th Cir. 2016) (Gorsuch, J. dissenting) ("[L]aw enforcement has found the knock and talk an increasingly attractive investigative tool and published cases approving knock and talks have grown legion"); Jamesa J. Drake, *Knock and Talk No More*, 67 Me. L. Rev. 25, 35–36 (2014) (detailing the widespread practice of knock-and-talks).

The damage caused by a limited curtilage doctrine is not evenly distributed. Poor and minority communities are disproportionately likely to live in multi-unit housing. In *United States v. Whitaker*, the Seventh Circuit found that over two-thirds of white households live in one-unit, detached houses, as

compared to less than half of black households. 820 F.3d 849, 854 (7th Cir. 2016) (citing the U.S. Census Bureau, *American Housing Survey* (2013)); *see also United States v. Pineda-Moreno*, 617 F.3d 1120, 1123 (9th Cir. 2010) (Kozinski, J., dissental) (arguing that modern curtilage rulings do not affect the "very rich," "but the vast majority of the 60 million people living in the Ninth Circuit will see their privacy materially diminished"); *United States v. Redmon*, 138 F.3d 1109, 1132 (7th Cir. 1998) (en banc) (Posner, J., dissenting) ("[C]urtilage is confined to farmers and to wealthy suburbanites and exurbanites"). The data also show that an increase in income is correlated with living in single-unit, detached homes. *Id.* This disparity in Fourth Amendment protection is all the more salient given that poorer citizens are more likely to interact with police. Sean M. Lewis, *The Fourth Amendment in the Hallway: Do Tenants Have a Constitutionally Protected Privacy Interest in the Locked Common Areas of Their Apartment Buildings?*, 101 Mich. L. Rev. 273, 306 n.229 (2002) ("Poor tenants, especially minorities, are much more likely to live in neighborhoods subject to close police scrutiny and are, therefore, more likely to feel the sting of unbridled police discretion.").

A reasonable expectation of privacy approach to curtilage also impacts residents in multi-unit dwellings differently depending on the configuration of the building. The Eighth Circuit found that the area outside an apartment door constituted the curtilage because the apartment door faced the outside, and "there is no 'common hallway' which all residents or guests must use to reach their units . . . [T]he walkway leading up to it was 'common' only to

Hopkins and his immediate neighbor." *United States v. Hopkins*, 824 F.3d 726, 732 (8th Cir. 2016). But had the tenant been living in an apartment with a hallway, there would have been no Fourth Amendment protection for that space. *United States v. Scott*, 610 F.3d 1009, 1015–16 (8th Cir. 2010) (rejecting a Fourth Amendment challenge in a common hallway). "Simply because of their living arrangement, poor individuals have little to no space designated as curtilage." Amelia L. Diedrich, *Secure in Their Yards?*, 39 Hastings Const. L.Q. 297, 315 (2011).

Those who live in separate domiciles under a common roof enjoy the same Fourth Amendment rights as those who live in single-family detached homes. Police practices of entering locked apartment buildings and arresting people without a warrant in hallways not open to the public is exactly the sort of unreasonable government intrusion that prompted the Fourth Amendment's passage. Accordingly, this Court's intervention is necessary to protect the rights of millions of disproportionately lower-income and minority Americans to be secure in their homes.

CONCLUSION

For the foregoing reasons, the judgment of the Massachusetts Appeals Court should be reversed.

Respectfully submitted,

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